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No. 92-1398

In The

Supreme Court of the United States

October Term, 1992

IN RE:

GREENE, RICHARD D. and DONNA J.,
husband and wife,

Debtors.

ROSS RICHARDSON, Chapter 7 Trustee,

Petitioner,

v.

MT. ADAMS FURNITURE,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Federal Bankruptcy Act, by clear and unequivocal language, abrogate the sovereign immunity of an otherwise immune Indian Nation?

2. Does Section 106(e) of the Federal Bankruptcy Act, by clear and unequivocal language, subject otherwise immune Indian Tribes to suit for the entry of money judgment?

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STATEMENT OF CASE

While petitioner's statement accurately reflects the majority of the facts, it is important for the Court to understand the case somewhat more precisely. This is not a case involving an issue of major proportion in the Nation or in Indian Country. Instead, it is a rather unique,

fact-bound issue involving a situation which will rarely arise again. The issue before the Ninth Circuit was narrowly drawn, and dealt solely and specifically with the Federal Bankruptcy Act. The issue here is governed by the terms of the Bankruptcy Act, particularly section 106(c) and its potential effect upon tribal sovereign immunity from suit under that act, as defined in the Ninth Circuit's opinion, and the opinions of this Court.

This is not a situation in which the Yakima Nation is attempting to assert its jurisdiction or authority over non-Indians, or to take some extra-territorial action against non-Indians. Instead, it is a case in which the Yakima Nation has simply raised the defense of sovereign immunity to a lawsuit to recover money judgment brought by the trustee in bankruptcy. The Yakima Nation filed no claim in the Bankruptcy, and did nothing which subjected itself to the jurisdiction of the Bankruptcy Court.

Both the Bankruptcy Court and the District Court improperly interpreted the law and the facts of the case in reaching their determinations. The Bankruptcy Court analyzed the situation as though the Yakima Nation was asserting Tribal Court jurisdiction over the situation or had taken other affirmative action. As the stipulated facts before that Court reflect (Appendix A hereto), there was never any question of Tribal Court action, or any other attempt by the Yakima Nation to assert any form of jurisdiction over their proceedings.

The Ninth Circuit's well reasoned opinion clearly recognized this situation and properly analyzed the case strictly from the standpoint of Tribal Immunity from suits

for money judgments such as those resulting from a claim of a bankruptcy preference.

As is noted in our statement of the questions presented, the issues here are the existence of tribal common law sovereign immunity from suit and whether Congress, by clear and unequivocal language in the Bankruptcy Act has abrogated that immunity. The Ninth Circuit in a well reasoned and proper opinion, determined that the Yakima Nation, under its sovereign retained power was immune from suit without clear and unequivocal action by Congress. It then found that the bankruptcy code, and particularly section 106(c), had not abrogated that immunity. It's decision is a proper statement of the law and does not warrant Certiorari.

BASES FOR DENIAL

I. The petitioner fails to set forth an adequate basis under rule 10 for granting the Writ.

Petitioner have requests that the Court grant its Writ to "resolve conflicts *in principle*" among the Federal Courts. Rule 10 clearly reflects that conflicts between Circuits be "on the same matter" and accordingly must be direct. The same is true of conflicts with opinions of State Courts of last resort. Nowhere in Rule 10 is there a provision allowing a grant of Certiorari on the basis of "conflicts in principle". Petitioner provides no citation or authority providing a basis for his argument regarding "conflicts in principle".

Respondent submits that before the Court exercises its extraordinary authority, that a petitioner should be held to exhibit actual and direct conflicts between Courts "on the same matter" as reflected in Rule 10. As is noted *infra,* Petitioner cited no direct instances of conflict on the precise issue of tribal immunity here presented. He cites no case by this Court or the Circuit Courts that hold that Yakima immunity has been abrogated by clear and unequivocal action of Congress.

Accordingly, this Court should deny that Petitioner's "conflict in principle" argument is a sufficient basis for granting of the Writ.

II. The Federal Law on tribal sovereign immunity from suits for money judgments is clear and well defined; this case presents no issue which requires further clarification from the Court.

This case presents no important question of Federal Law which has not been settled by this Court. This Court has previously concluded and clearly defined the law pertaining to the existence of tribal common law sovereignty from suit and the legal requirement necessary to affect a waiver or abrogation of that immunity. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978); *Oklahoma Tax Commission v. Potowatomi Tribe,* 498 U.S. ___, 111 S.Ct. 905, 112 L. Ed.2d 1112 (1991). The rule of this Court has been that the Tribes have retained the common law sovereignty they possessed as Sovereigns at the time of their treaties. In order to find an alteration or abrogation of that sovereignty, there must be "unequivocal" action by Congress specifically dealing with the sovereignty issue. Here the

Ninth Circuit followed this Court's cases on the issue and properly found no "unequivocal" abrogation of the Yakima Nation's immunity from suit. Action by this Court is not necessary, for the Ninth Circuit's opinion reaches the same conclusions as the opinions of this Court.

III. The decision of the Ninth Circuit does not conflict with decisions of this Court.

The decision of the Ninth Circuit carefully and completely analyzed the opinion of this Court on the issues of both the United States Common Law Immunity (Petitioner's Appendix A, pages 12-15) and its rulings on the existence of tribal immunity absent congressional actions to dissolve it.

In its analysis, the Ninth circuit properly determined that at the time of the Yakima Treaty in 1855, Indian Nations were, under the decisions of this Court, sovereign nations, properly recognizing the principles set forth by this Court in *Worcesta v. Georgia*, 31 U.S. 515 (1805), and continuing through the recent decision in *Oklahoma Tax Commissioner v. Citizens Band of Potowatomi*, 498 U.S. ___, 111 S.Ct. 905, 112 L.Ed 2d 1112 (1991). The Ninth Circuit then analyzed the status of common law sovereign immunity at Yakima Treaty time, stating that:

> Contemporaneously with Senate ratification of the Treaty with the Yakimas in 1859 (12 Stat. 951), the Supreme Court said, "[i]t is *an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission . . . " Beers v. Arkansas*, 61 U.S. 527, 529 (1857).

(Petitioner's Appendix A, page 12 n.4)

It then determined, consistent with every ruling of this Court on the subject, that the Yakima Nation, pursuant to its Treaty, had retained its common law sovereign immunity from suit, as set forth in *Beers, supra,* subject only to the power of Congress to abrogate that immunity. It specifically analyzed this Court's decisions in *United States v. United States Fidelity and Guaranty Company,* 309 U.S. 506 (1939); *Puyallup Tribe v. Department of Game,* 433 U.S. 165 (1977) (Puyallup III); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978) and *Potowatomi, supra,* and held that unless the bankruptcy trustee could point to a clear and unequivocal congressional abrogation, the Yakima Nation's immunity from suit had not been abrogated. The Ninth Circuit relied specifically on this Court's holding in *Puyallup Tribe v. Department of Game,* 433 U.S. 165, at 167-168, to determine that this Court had, at least, impliedly, recognized that tribal immunity existed both on and off the *reservation.* It then looked at the recent decision in *Potowatomi, supra,* and adopted its language that:

> Congress has always been at liberty to dispense with such Tribal Immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, *it has never authorized suits to enforce tax assessments. Instead, Congress has consistently reiterated its approval of the immunity doctrine.* . . . These Acts reflect Congress' desire to promote the "goal of Indian self-government", including its "overriding goal" of encouraging tribal self-sufficiency and economic development. . . . Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity. *Oklahoma Tax Commission v.*

> *Potowatomi Tribe*, 498 U.S. ___, 112 L. Ed.2d 1112, 1120-21 (emphasis supplied).

The Ninth Circuit then concluded, in language consistent with the holdings of this Court in *Puyallup, III, supra, Santa Clara Pueblo v. Martinez, supra, U.S. v. U.S. Fidelity and Guaranty Company, supra,* and *Potowatomi, supra,* that:

> We conclude from the above analysis that Sovereign Immunity, as it existed at common law, had an extra territorial aspect. 'The Common Law Sovereign Immunity possessed by the Tribe is a necessary incident to Indian Sovereignty and self government'. *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 891 (1986).

(Petitioner's Appendix A, page 15)

This conclusion is well reasoned and consistent with the opinions of this Court on Tribal claims of sovereign immunity from suits for money judgments. There is no conflict with this Court's immunity decisions which warrant a grant of Certiorari.

IV. The decision in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) is not in conflict with this decision.

Petitioner submits that the holding by this Court in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) is in conflict with the Ninth Circuit opinion. Respondent disagrees on several bases.

First and foremost, petitioner misconstrues *Mescalero's* holding as to the issue of the Apache Tribe's immunity. He argues that this Court's determination of Mescalero's *liability* for the payment of some state taxes for off-reservation activities equates with a waiver of the

Tribe's immunity from an action to physically *collect* these taxes. A clear reading of the *Mescalero* opinion reflects that this Court never reached that issue. The sole issue before the court was whether New Mexico could *levy and assess* taxes against the Apache business operation because of it's off-reservation status. The Court never reached the question of collection and direct action for collection against the Tribe itself.

This Court limited its ruling to the narrow facts of the case before it, specifically finding that it was the Apache Tribe's Ski Resort, not the Tribe itself, that was subject to the tax:

> We therefore hold that the exemption in Section 465 does not encompass or the collection of nondiscriminatory gross receipts tax and that the *Tribe's ski resort* is subject to that tax. (411 U.S. 145, 158). (emphasis added).

The issue of direct colletion action against the Tribe was never included. Had it been, respondent submits that the result would have been consistent with the Ninth Circuit opinion, and this Court's opinion in *Potowatomi, supra,* where the Court found Tribal tax *liability,* but no congressional action which abrogated tribal immunity to allow *collection* directly from the Tribe:

> Congress has always been at liberty to dispense with such Tribal Immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian Tribes, it has never authorized suits to enforce tax assessments. (*Potowatomi, supra* at 112 L.Ed 1112, 1120)

Clearly there is no conflict with the opinion in *Mescalero, supra,* regarding Tribal immunity from direct suit to collect

a money judgment. *Mescalero* did not reach the issue, but if it had, this Court's opinion in *Potowatomi* makes it clear what the decision would have been.

Further, *Mescalero* is distinguishable on the basis that this Court impliedly found that Congress, through approval of the New Mexico State Enabling Act, allowing for taxation of off-reservation acts of Indians, had authorized the tax assessment in *Mescalero*. That is not the case here. The Ninth Circuit specifically found *no* Congressional action which has limited tribal immunity from suit. As is argued *infra*, this Court, in construing section 106(c) of the Bankruptcy Act, has found that it does not, for purposes of State and Federal Sovereign Immunity, effect an abrogation for purposes of money judgments for bankruptcy preferences. Accordingly section 106(c) does not abrogate any tribal immunity.

Finally, Petitioner cites *Mescalero* as this Court's ultimate statement that tribal activities outside reservations, with non-Indians, automatically subjects the tribes to blanket waivers of their sovereignty. *Mescalero* does not so hold, and in fact found that a portion of the Apache Tribe's off-reservation activities were exempt from State taxation:

> In view of Section 465, these pertinent improvements of the Tribe's tax exempt land would certainly be immune from the State's ad valorem property tax. *Mescalero, supra,* at 411 U.S. 145, 158.

Just as the Ninth Circuit did in it's opinion in analyzing congressional acts which might have affected Yakima Tribal immunity, this Court, by looking to Federal law, determined that a portion of the Mescalero Tribe's off-

reservation activities were in fact immune from State taxation. While the facts are somewhat different from the case at bar, *Mescalero* cannot be said to provide a "blanket" holding that *all* off-reservation activities with non-Indians automatically constitute a waiver of tribal immunity. The Ninth Circuit carefully analyzed this situation and correctly rendered a decision consistent with the opinion of this Court in *Mescalero*.

V. This opinion does not conflict with the Tenth Circuit opinion in *Dry Creek Lodge v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), or any other decision of the Circuits.

Petitioner submits that the decision in *Dry Creek Lodge v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980) and the opinion here before the court are in conflict, thereby warranting Certiorari.

Petitioner alleges that the *Dry Creek* holding, like his argument regarding *Mescalero*, provides a "blanket" rule that tribal dealings with non-Indians somehow results in waivers of tribal immunity, without any showing of congressional action to affect the immunity. Respondent submits that the *Dry Creek* ruling was based specifically upon a Federal statute, the Indian Civil Rights Act (ICRA), which the Court there found had abrogated, or at least limited, sovereign immunity. Accordingly, it is readily distinguishable from this case, in which the Ninth Circuit found that the Bankruptcy Act *had not* abrogated Yakima immunity.

The *Dry Creek* Court was dealing with an issue involving an egregious violation of the civil rights of non-Indian, citizens of the Wind River reservation. In reaching

its ruling, the Court engaged in a lengthy analysis of the Indian Civil Rights Act, 25 USC 1301 et seq. (ICRA) as it was discussed by this Court in *Santa Clara Pueblo v. Martinez* 436 U.S. 49 (1978). In a rather stilted analysis, the Tenth Circuit found that this Court, in *Martinez*, had found no waiver of sovereign immunity by ICRA only because Martinez, as a tribal member, had access to redress within the tribal process:

> With the reliance on the internal relief available, the Court in *Santa Clara* placed the limitations on the ICRA as a source of a remedy. *Dry Creek*, 635 F.2d 682, 685.

The Tenth Circuit then went on to find that under the facts before it, the non-Indian plaintiffs could enjoy none of the internal tribal remedies available to *Martinez* as a tribal member, and accordingly, without a determination that ICRA allowed them a remedy, plaintiffs had no recourse for the violation of their civil rights:

> But in the absence of such relief or remedy the reason for the limitations disappears. *Dry Creek* at 685.

The *Dry Creek* Court necessarily found, that as to the acts of the tribes vis-a-vis non-Indians who had no internal tribal remedy, that ICRA had "unequivocally expressed" an abrogation or limitation of tribal immunity under the *Dry Creek* facts. The *Dry Creek* ruling found an abrogation or limitation of sovereign immunity not because of "dealings with non-Indians" as Petitioner submits, but instead because in its opinion ICRA had abrogated or limited the immunity.

This interpretation of the Court's opinion in *Dry Creek* is reinforced by the subsequent Tenth Circuit

opinion of *Ramey Construction v. Apache Tribe of the Mescalero Reservation*, 673 F2d 315 (10th Cir. 1982). In *Ramey*, the Court noted that the plaintiff relied "heavily" upon the *Dry Creek* opinion, claiming that tribal contractual dealings with non-Indians constituted a waiver of sovereign immunity. The Tenth Circuit denied this claim, holding that *Dry Creek* was a statutory interpretation case involving Congress's action under ICRA, facts which were not present in the *Ramey* decision:

> In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), the Supreme Court clarified the meaning and effect of § 1302 of the ICRA. The Court made clear that, aside from authorizing writ of habeas corpus actions as provided in § 1303, the ICRA leaves tribal Sovereign Immunity intact. *Id.* at 59, 98 S.Ct. at 1677. In this action, Ramey has alleged a claim for damages based on breach of contract. This type of injury does not rise to the level of a constitutional deprivation to be redressed under the ICRA. (footnote 4) *Therefore, the ICRA neither provides a jurisdictional basis for Ramey's claims nor waives the Tribe's Sovereign Immunity.*
>
> At footnote 4, the Ramey Court noted:
>
> Ramey relies heavily on *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981). That case involved particularly egregious allegations of personal restraint and deprivation of personal rights that are not present in this action.

Clearly the Tenth Circuit, in the subsequent *Ramey* decision, recognizes that *Dry Creek*, contrary to petitioner's assertions, did not create a "blanket" waiver of

tribal immunity without any showing of unequivocal Congressional action. It held precisely that *Dry Creek* was a statutory interpretation case involving ICRA, not a holding that dealings with non-Indians *per se* created a waiver of tribal immunity.

The case at bar properly finds Yakima Tribal retention of sovereign immunity, and finds that the Bankruptcy Act has not abrogated it. *Dry Creek* is no different, except that it found a Federal statute, ICRA, that had at least limited tribal sovereign immunity, thereby allowing the suit against the Tribe. The cases are identical in determining that immunity exists unless modified by congress. They differ only due to different facts and different statutes. This is not a conflict of decisions, but instead determinations by two Courts dealing with different issues and different facts. Their existence does not warrant Certiorari.

As the Court in *Ramey, supra,* reflects, there is no confusion in the Tenth Circuit that tribal immunity exists unless abrogated by "Congressional" action of Congress. Nothing in *Dry Creek, supra,* or *Ramey, supra,* lead to a contrary conclusion. Petitioner points to no other Circuit opinion which is in conflict. *Dry Creek, supra,* does not warrant a Writ of Certiorari.

VI. The Ninth Circuit properly analyzed Federal Law in reaching its conclusion and properly analyzed and dealt with State Court opinions in a manner which provides clarity to issues of tribal immunity from suit.

This action involves the ability of a Federal Bankruptcy Act Trustee to obtain a money judgment against an Indian Tribe. The question before the Ninth Circuit, as it properly perceived it, was one based solely on Federal

Law, (Petitioner's Appendix A, page 11). The Ninth Circuit correctly analyzed the issue of tribal common law sovereign immunity as it exists today, and clearly distinguished the ruling of the New Mexico Supreme Court in the case of *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988).

> The issues involved in the *Padilla* case are not before us and we discuss it here only for the purpose of making the point that *the scope of Tribal Immunity has to be measured at the Common Law as it existed at some earlier time*, rather than adopting present limits on Sovereign Immunity accepted by the States for their own purposes.

Clearly the analysis followed by the New Mexico Supreme Court in *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988) was one based solely on its perception of the law of New Mexico, in a purely State Court civil proceeding. While the Yakima Nation disagrees wholeheartedly with the *Padilla* holding, it forms no basis for a grant of Certiorari.

The issue here presented, being one of Federal statutory interpretation, and of federal common law immunity, creates no confusion or conflict in State Court proceedings, as those Courts must deal with the issue here presented through that federal law.

Further, this Court has in the past agreed that *Padilla* involved no significant State Court conflict which merits Certiorari. This Court rejected Certiorari on the *Padilla* case in 1988, in spite of the fact that the State Supreme Court decisions in *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968); *White Mountain Apache Indian Tribe v. Shelby*, 443 P.2d 421 (Arizona 1971); and *North Sea*

Products Ltd. v. Clipper Seafoods Co., 595 P.2d 938 (Wash. 1979), were all in existence at the time of the *Padilla* petition. Petitioners here allege *Padilla* is in conflict with these decisions, and the decision of the Ninth Circuit, thereby meriting a grant of Certiorari on that basis. Clearly this Court, in denying the Petition in *Padilla*, was aware of the alleged conflict, but felt the issue was not worthy of a grant of Certiorari. Such an alleged conflict should not now merit Certiorari.

Now, in light of the Court's recent ruling in *Patowatomi, supra*, it is clear that this Court recognizes the common law immunity of tribes under Federal Law, *Padilla* notwithstanding and correctly opined that if it presents a problem to Indian – non-Indian commerce, that Congress is best suited to deal with the issues.

Petitioner's allegations that a conflict with a State Court opinion warrants Certiorari are overridden by the totally Federal nature of this case, and by the cases of this Court, particularly *Potowatomi*, upholding the concept of continuing tribal immunity from unconsented suits for money judgments.

Further, the Ninth Circuit's opinion deals succinctly and clearly with the *Padilla* decision, and no further clarification is needed. The Ninth Circuit, after analyzing the Federal Law imperatives dealing with tribal immunity, stated:

> If there were error in the *Padilla* court's analysis, it was in failing to recognize that the scope of tribal immunity in the courts of New Mexico was not wholly a question of New Mexico law. As the *Padilla* court itself noted, "[a]bsent federal authorization, tribal immunity

> is privileged from diminution by the states." 754 P.2d at 847. *Thus, the court should have looked at the scope of tribal immunity under federal law, rather than the extent of comity afforded under state law.*
>
> The issues involved in the *Padilla* case are not before us, and we discuss it here only for the purpose of making the point that the scope of tribal immunity has to be measured at the common law as it existed at some earlier time, (footnote 4) rather than adopting present limits on sovereign immunity accepted by the states for their own purposes. (Petitioner's appendix A, pages 12-13)

If the Court denies Certiorari, the Ninth Circuit's analysis provides close and concise direction as to the resolution of tribal sovereign immunity issues. This Court need provide no further clarification than it has already done in its previous decisions on this issue.

VII. The "Dependent Status" test of *Oliphant v. Sequamish Tribe*, 435 U.S. 91 (1978), and *Montana v. U.S.*, 450 U.S. 544 (1983) is not one applied by this Court in Tribal Sovereign Immunity from suit.

Petitioner submits that the rulings of this Court in *Montana v. U.S., supra* and *Oliphant, supra,* hold that in dealings with non-Indians, the tribal "dependent status" doctrine has abolished tribal sovereign immunity from suit. It is obvious from a reading of any of those cases that this Court has made no such ruling. In fact, in a case involving the Yakima Nation, this Court specifically held that **"Tribal powers are not implicitly divested by virtue**

of the Tribe's dependent status." *Washington v. Confederated Tribes and Bands of the Yakima Indian Nation*, 447 U.S. 134, 153-54 (1976). This is consistent with this Court's ruling in *Potowatomi, supra.*

While Tribes may occupy the "dependent status" alleged by Petitioner, this Court's independent line of sovereign immunity cases reflects that tribal sovereign immunity from suit, in dealings with non-Indians, is alive and well. *United States v. U.S. Fidelity and Guaranty Co., supra, Puyallup III, supra* and *Potowatomi, supra,* all involve Tribal dealings with non-Indians, with the Court recognizing the vibrancy of the tribes immunity from unconsented suits. The "Dependent Status" test is not a factor in the analysis of the "immunity from suit" line of cases. Petitioner is simply wrong in concluding that the "dependent status" test is a proper one in this case.

The Ninth Circuit opinion here carefully and correctly analyzed and rejected Petitioner's "dependent status" argument, finally concluding:

> In a general sense, a claim of tribal sovereign immunity involves external relations of the tribe. However, the dependent status of the tribes has been a factor in the analysis of tribal sovereignty where the tribe is affirmatively asserting its authority, whether to sell land, to deal directly with foreign governments, or try nonmembers in tribal courts. *An assertion of sovereign immunity is not an affirmative act of the tribe, in the sense involved in the dependent status cases. It is instead, a claim of status arising from sovereignty itself.* Whether for this reason or others, the dependent status analysis has not

> been used by the Supreme Court in cases involving claims of tribal immunity. . . .
>
> As we analyze this somewhat confusing area of Indian tribal jurisprudence, we conclude that the pre-emption analysis comes into play when a state tries to regulate or tax activities on an Indian reservation. The dependent status of the tribes becomes a factor when a tribe is affirmatively asserting its sovereignty in dealing with its property or with non-tribal members. *Neither is involved when a wholly-owned tribal enterprise doing business on the reservation claims tribal immunity from a suit which is the result of a private commercial transaction. Tribal immunity from suit arises from the Government's recognition that Indian tribes possess the attributes of a common law sovereign, and neither pre-emption nor dependent status analyses have been stated by the Supreme Court to affect that status.* (emphasis added) (Petitioner's Appendix A, pages 13-14)

Respondent submits that this language clearly, succinctly and accurately reflects the law of the land. The opinion of the Ninth Circuit says it in a nutshell: This Court does not apply the "dependent status" test to issues of sovereign immunity from suit. There is no basis for review under this section of Petitioner's argument.

VIII. The Ninth Circuit properly determined, by analysis of this Court's recent decision in *Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96 (1989) and *United States v. Nordic Village, Inc.*, 503 U.S. ___, 117 L. Ed.2d 181 (1992), that Section 106(c) of the Bankruptcy Act did not abrogate the Yakima Nation's sovereign immunity from suit.

Petitioner argues that the Ninth Circuit erred in its analysis of the effects of section 106(c) on tribal immunity from suit. Although it is difficult to determine his exact argument, it appears that it is that the bankruptcy act is one of general application and therefore applies to Indians as well as all citizens of the United States. This argument ignores the rulings of this Court regarding tribal sovereign immunity. This Court has consistently held that tribal sovereignty and tribal sovereign immunity pre-dated the times of Treaty making and were part of the powers retained by Tribes. Accordingly, tribal immunity could only be affected by clear and unequivocal action by Congress:

> *"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.* (citations omitted) This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But 'without congressional authorization' the 'Indian nations are exempt from suit'. (citation omitted) *It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed'."* (emphasis supplied) *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58

The Ninth Circuit opinion properly recognized the Yakima Nation's sovereign immunity from suit, and then proceeded to analyze the decision of this Court regarding the provisions of section 106(c) of the Bankruptcy Act, to determine what, if any, effect that Act has on tribal immunity from suit.

In its analysis, the Ninth Circuit relied on two recent cases from this Court, *Hoffman v. Connecticut Department of Income Maintenance,* 492 U.S. 96 (1989) and *United States v. Nordic Village, Inc.,* 503 U.S. ___, 117 L. Ed.2d 181.

Following its determination, under this Court's ruling in *Martinez, supra,* that abrogation of tribal immunity must be clear and unequivocal, the Ninth Circuit analyzed the tests applied by this Court for State and United States' abrogations of immunity from suit discussed in *Hoffman, supra,* and *Nordic Village, supra.* It found the test for abrogation of United States immunity is virtually identical to that required for Tribes:

> Waivers of the Government's sovereign immunity, to be effective, must be "unequivocally expressed." *Nordic Village,* 117 L. Ed.2d 181, 187

and

> Neither § 106(c) nor any other provision of law establishes an *unequivocal textual waiver* of the Government's immunity from a bankruptcy trustee's claims for monetary relief. Since Congress has not empowered a bankruptcy court to order a recovery of money from the United States, the judgment of the Court of Appeals must be reversed. (emphasis added) *Nordic Village,* 117 L. Ed.2d 181, 191

The Ninth Circuit likewise looked at the decision in *Hoffman, supra,* in which this Court determined that section 106(c) did not satisfy the standard that Congress made its intention to abrogate state immunity from suit "unmistakably clear":

> We disagree. As we have repeatedly stated, to abrogate the State's Eleventh Amendment immunity from suit in federal court, which the parties do not dispute would otherwise bar these actions, *Congress must make its intention "unmistably clear in the language of the statute."* (citations omitted) . . .
>
> In our view, § 106(c) does not satisfy this standard. *Hoffman,* 492 U.S. 96, 101 (emphasis added)

The Ninth Circuit, following the rulings in *Hoffman, supra,* and *Nordic Village, supra,* determined that the abrogation tests for Tribes was identical to the test applied in these cases. It then found that since section 106(c) did not "unequivocally" abrogate State or Federal immunity from suit, then it could not, under the standards set by this Court, abrogate tribal immunity. This conclusion is particularly compelling because both the statute and its legislative history are devoid of any mention of Indian Tribal governments.

The Ninth Circuit analysis is well reasoned and properly follows the precedents of this Court. There is no error in the conclusion of the Ninth Circuit. This Court should not disturb its ruling.

CONCLUSION

Petitioner points to no conflict with the decisions of this Court on the issue of tribal sovereign immunity. He attempts to reargue the case he presented to the Ninth Circuit. The opinion of that Court has squarely met and dismissed each of his arguments. The Ninth Circuit opinion is a well reasoned, solidly analyzed, and legally proper holding on the issues before it. It complies with this Court's opinions and the law of this land. It creates no conflict between the Circuits, and gives clear and concise guidance to lower federal courts. The supervisory powers of this Court are not necessary.

A grant of certiorari is not necessary in this matter.

DATED this 5th day of April, 1993.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

IN RE:

GREENE, Richard D.
and Donna J., No. 89-20544

Debtor(s).

ROSS RICHARDSON, Trustee,

Plaintiff,

v. Adversarial No. 90-0023

MT. ADAMS FURNITURE,

Defendant.

STIPULATED FACTS RE: TRUSTEE'S COMPLAINT
TO SET ASIDE PREFERENTIAL TRANSFER
UNDER SECTION 547

Pursuant to this Court's Orders of April 11, 1990, and May 8, 1990, counsel for the parties to this adversary proceeding submit the following stipulated facts:

1. The above-referenced Debtors filed a Petition for relief under Chapter 7 of the Bankruptcy Code on April 26, 1989. Prior to that time, the Debtors were operating a business known as Custom Carpets, in Townsend, Montana.

2. Mt. Adams Furniture has its principal place of business in Wapato, Washington, and is a wholly owned and managed enterprise of the Confederated Tribes and Bands of the Yakima Indian Nation.

3. The Defendant, pursuant to its business, supplied and sold to Custom Carpets furniture items which subsequently became inventory of Custom Carpets, with title passing to Custom Carpets.

4. Mt. Adams Furniture held no perfected security interest in the furniture items sold to Custom Furniture, and within 90 days prior to the filing of the Debtors' Chapter 7 Petition, repossessed a portion of the furniture which had been sold to Custom Carpets. The value of this property repossessed was in the amount of $8,779, as evidenced by the credit memos attached hereto as Exhibit A.

5. That the repossession was voluntary and took place on account of an antecedent debt owed by Custom Carpets to Mt. Adams Furniture.

6. Mt. Adams Furniture had no knowledge that Custom Carpets would file bankruptcy proceedings within 90 days of the date of repossession.

7. That the parties agree that under the above-stated facts, a preferential transfer occurred under 11 U.S.C. Section 547. The primary issue to be decided by the Court is whether or not Mt. Adams Furniture is immune from suit by virtue of its status as a wholly owned enterprise of the Yakima Indian Nation.

These facts appear, to the undersigned counsel, to be the operative facts in determining the legal issues set

forth above. If any disputed facts come to the attention of counsel, those facts will be submitted in the memorandum to be filed with the Court, but counsel is not aware of any disputed facts at the time of executing this stipulation.

DATED this 1st day of June, 1990.

U.S. BANKRUPTCY TRUSTEE

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